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STRATEGY RESEARCH PROJECT

TERRORISM: CRIMINAL ACT OR ACT OF WAR IMPLICATIONS FOR NATIONAL SECURITY IN THE 21ST CENTURY

BY

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Terrorism: Criminal Act or Act of War Implications for National Security in the 21st Century

by

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U.S. Army War College CARLISLE BARRACKS, PENNSYLVANIA 17013

ABSTRACT

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There is no one logical determination for classifying all acts of terrorism, either as acts of war or criminal acts. In light of the predicted terrorist threat significant enough to threaten the survival of the nation (catastrophic terror), this determination is less a legal or academic exercise and more practically one based on how such a determination governs the paradigm (law enforcement or national security) we use to respond to the threat. More important is how that response protects our nation's interests and our status in the world community. Catastrophic terror makes relying solely on a law enforcement response a dangerous option. Yet reflecting on the changing strategic environment, an act of war determination in a legal classical sense is equally impractical. A new determination carrying the same weight as an act of war must be developed and accepted domestically and internationally to provide legal response options offering greater latitude to law enforcement and national security forces. This latitude will provide the means to better meet threats to national security in the 21st century.

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PREFACE

Thanks to my Project Advisor, COL Joe Robinson for assisting with formulating the topic and driving the pace of the progress.

The Library staff at the college is first rate. A wonderful and positive group of professionals who bend over backward to help.. It makes using the facility a pleasure

TERRORISM - CRIMINAL ACT OR ACT OF WAR

The 21st century presents many challenges to the future security of the United States. The collapse of the Soviet Union triggered unprecedented change in the balance of power throughout the world. Globalization, failed states, states in transition to democracy, as well as other changes are having both positive and negative effects. As the sole superpower, the United States tends to be the beneficiary of the positive and often is blamed for much of the negative and as such the likelihood of terrorism directed at the United States is increasing. Seen as the only way to deal with the power and influence of the United States, our opponents mean to challenge us asymmetrically using terrorism as a weapon to wage war. Perhaps most troubling, is that the threat is growing more complex and more lethal. Transnational organizations, such as Osama bin Laden's al Qaeda based in Afghanistan, are examples of this complexity. Determining a linkage between these organizations and a state is difficult. Consequently, forming and directing a response that strikes a balance between the rule of law and our national security is equally more difficult. Add to this continuing advances in technology, the free flow of information, the Internet, and recent terrorist trends and it all points to an undeniable fact - the threat of a catastrophic terrorist attack against the United States is a clear and present danger.² These threats have been laid out in our National Security Strategy and recognized in numerous studies looking at national security challenges in the 21st century. Meeting these challenges requires relooking how we will respond to these acts. Acts that arguably could be considered acts of war. Ideally we hope to deter attack, but failing that the US must be able to move quickly and decisively to detect and preempt an attack and if all else fails to retaliate to discourage and prevent further attack. We must do all this without shying from our national interests, jeopardizing our position among the nations of the world, or eroding the freedoms we enjoy at home.

This paper will look at legal and doctrinal considerations impacting our response to terrorism and determine whether we should consider terrorism an act of war or a criminal act. The paper will also address the national security implications of this determination. It is commonly accepted that terrorist fall into three categories: Criminals, Crusaders, or Crazies.³ This is in keeping with the current joint definition of terrorism. For the purpose of this study I will look only at threat situations against the US presented by crusaders – those with a political, religious, or ideological motive.⁴

THESIS

This paper will show that there is no one logical determination for classifying all acts of terrorism, as solely either acts of war or criminal acts. In light of the predicted terrorist threat significant enough to threaten the survival of the nation (catastrophic terror), this determination is less a legal or academic exercise and more practically one based on how such a determination governs the paradigm (law enforcement or national security) we use to respond to the threat. More important is how that response protects our nation's interests and our status in the world community. Catastrophic terror makes relying solely on a law enforcement response a dangerous decision. Yet reflecting on the changing strategic environment, an act of war determination in a legal classical sense is equally impractical. This paper will further show that a new determination carrying the same weight as an act of war must be developed and accepted domestically and internationally to provide legal response options offering greater latitude to law enforcement and national security forces. This latitude will provide the means to better meet threats to national security in the 21st century.

BACKGROUND

STRATEGIC ENVIRONMENT

"We are entering a new American century in which we will become still wealthier and culturally more lethal and increasingly powerful. We will excite hatred without precedent." 5

This prediction by author Ralph Peters may be a bit overstated, but the root message is valid nonetheless. After the fall of the Soviet Union many predicted a period of peace. Instead the advent of a new world order, a catalyst for unprecedented change, has triggered a great deal of instability as the people and nations of the world adjust to dynamic shifts in environment.

Since the fall of the Berlin Wall and the breakup of the Soviet Union the world has been subjected to a number of significant shifts in the strategic environment. The vacuum of power caused by the collapse of the Warsaw Pact is being filled in part by the United States and our allies. Yet, this vacuum also produced a rash of failed states and regional conflicts and tensions such as Somalia, Bosnia, Kosovo, and Chechnya. The failure of communism and the subsequent transition by many states to democracy increased the openness by which the

nations of the world conduct business. Globalization, fueled by this openness and leveraged by technology and the Internet, has blurred the lines between nations and cultures. While beneficial to many, this globalization causes intense pressures on those who feel that their national identities, their religions, and their cultures are at risk. A benefit of globalization is reflected in the increasing prosperity among the countries of the developed world. Conversely this prosperity is widening the gap between the rich developed countries and the countries and peoples of the developing third world.⁶ The new world order is marked by dynamic and often volatile shifts in power – military, political, economic, informational, and cultural. The United States the sole remaining superpower is squarely in the middle of these shifts.

While well intended, the shaping pillar of our national security strategy puts the United States on the back of these dynamic shifts of power as we try with our allies to maintain stability, promote democracy, and foster free trade. Despite our sincere intentions and the goodwill we export, our methods, our position, and our power produce enemies as well. No nation or organization can seriously challenge the conventional power of the U.S. and its allies. This point was clearly demonstrated during the Gulf War and more recently in Serbia. Unable to influence or just plain hurt the United States by conventional means or through other elements of power, our enemies seek to challenge us asymmetrically and terror, catastrophic terror, is a growing method of choice.

CATASTROPHIC TERRORISM

"War is a time-honored means of forcing nations to take actions against their will. Our dominant military force protects the US against coercion by war, but in this "Brave New World," organized terrorism could become a means of coercing the US to take actions contrary to our interests." ¹⁰

The terrorist threat of the 21st century is in transition. While the numbers of terrorist attacks have decreased over the last decade, the nature of terror organizations and the lethality of the weapons in their arsenals or within their grasp should give the United States pause.¹¹ Terror organizations have become increasingly transnational in nature. They are simple, flat, and highly networked. These terror groups, working as surrogates of states or executing operations in their own interest, are responding to the power of the United States

asymmetrically and seem to be less constrained in the use of force. Their feeling of helplessness in dealing with the threat they perceive from us coupled with the knowledge of the consequences of taking credit for an attack raise the level of hatred in our enemies and consequently increase the likelihood of catastrophic attack. General Hugh Shelton, the Chairman Joint Chiefs of Staff, referring to U.S. antiterrorist operations launched against the Osama bin Laden's al Qaeda after the embassy bombings in Africa put it this way - "We are in a different ball game today." ¹²

The dynamics of the changing world order are a catalyst for transnational terrorist that have little or no ties to any state. These same dynamics have also produced a growing number of areas such as failed states, which provide breeding grounds and safe haven for these transnational groups. Transnational terror organizations are loosely affiliated; members often do not consider themselves a citizen of any particular country. Unlike traditional state sponsored groups such as many of the Palestinian terror organizations, transnational groups tend to defy classification. France's leading terror expert, Xavier Raufer, put it this way. "At any given time, you can take a picture of the worldwide Islamic terrorist infrastructure – but two hours later, the entire constellation will appear radically different."

Probably the most disturbing factor in this equation is not the increased likelihood of attack on the US, not the difficulties presented by terror as a form of asymmetric attack, nor the difficulties in dealing with highly networked transnational terror groups. It is the growing tendency toward, and the ability to execute, terror at a more lethal level - Catastrophic terrorism. Catastrophic Terrorism is that form of terrorism involving weapons of mass destruction, cyber attack, or I believe a concerted series of smaller conventional terror attacks that severely threaten the stability and even the very existence of our government, our key institutions, and our ability to protect and further our national interests. 15 In the past crusaders used a form of constrained terror. Incidents were designed to gain enough attention and hopefully public support for a cause. Certainly mass casualties or even significant material damage would jeopardize that public support. An attack's primary effect was to gain media attention to focus the world on the plight of a group and hopefully to impact world leaders to influence future events in their favor. The attacks on Khobar Towers, our embassies in Africa, the Murrah Building in Oklahoma, and the World Trade Center are early examples of this new form of terrorism. These new terrorist acts are marked by the desire to inflict great damage and mass casualties and in many cases to do so while remaining anonymous. While these groups

recognize that the world has become complacent toward certain levels of terror - it takes a bigger attack to get the same attention - publicity is no longer the primary goal.¹⁶

The potential loss from an act of catastrophic terrorism cannot be ignored. Former Secretary of Defense Cohen's Annual Report to the President and Congress sites experts predicting the use of weapons of mass destruction in the U.S. in the near future. Two former commanders in chief of our Central Command as well as are among many officials who have publicly stated that it is not a question of if this type of terrorist attack will occur but when. While it is still not child's play to put together and deliver a weapon of mass destruction or an effective cyber attack, it has however, moved from the possible to the probable category and getting more probable as time goes by. The impact of an attack and the impact caused by our response or lack of response could have devastating effects.

RESPONSE SPECTRUM

Any good business conducts a risk analysis to determine its optimum response to risk. Two fundamental elements of a risk analysis is to determine the probability of an event occurring and the likely loss should it occur. In addressing the strategic environment we looked at catastrophic terrorism and our vulnerability to it. Our response to the threat runs across a spectrum consisting of 5 areas: deter, detect, preempt, crisis response, and consequence management.¹⁹

This study has no metrics to determine the precise likelihood of catastrophic terrorist attack against the US nor any scientific evidence on the gravity of such an attack should it happen. What we do have are terrorist experts and national security officials saying that these attacks will happen. The likely loss from such an attack is astronomical. In the past our efforts to fight terrorism focused on the traditional, constrained terrorism. Although there were efforts in all areas of the response spectrum addressed above, the focus was on self-insurance – when it happens we'll react. The stakes are now much too high and therefore we must focus greater attention on deterring, detecting, and preempting these acts of terror.²⁰

DOCTRINE AND LEGAL ASPECTS OF TERRORISM

The purpose of this section is to provide the reader with background on definitions, doctrine, agreements, treaties, laws, and policies and procedures key to understanding legal options available to the United States in responding to the threat of terrorism and in determining if a given terrorist act should be considered an act of war or a criminal act.

TERRORISM DEFINITIONS

There remains no internationally accepted definition for terrorism and while we have improved there still remains differences in definitions among the key US agencies: DOS, DOD, and the FBI. Definitions uniformly address "unlawful" acts of violence as the mark of a terrorist, which is why the FBI considers terrorists criminals.²¹ The following are some key definitions:

Code of Federal Regulations: Terrorism is defined as the unlawful use of force and violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives.²²

FBI: Domestic terrorism is the unlawful use, or threatened use, of force or violence by a group or individual based and operating entirely within the United States or Puerto Rico without foreign direction committed against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof in furtherance of political or social objectives.²³

FBI: International terrorism involves violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or any state, or that would be a criminal violation if committed within the jurisdiction of the United States or any state. These acts appear to be intended to intimidate or coerce a civilian population, influence the policy of a government by intimidation or coercion, or affect the conduct of a government by assassination or kidnapping. International terrorist acts occur outside the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum.²⁴

DOS {22 USC 2656f(d)}: Terrorism is premeditated, politically motivated violence perpetrated against noncombatant targets by sub-national groups or clandestine agents, usually intended to influence an audience. International terrorism is terrorism involving citizens or the territory of more than one country.²⁵

DOD Joint Publications: The calculated use of unlawful violence or threat of unlawful violence to inculcate fear; intended to coerce or to intimidate governments or societies in the pursuit of goals that are generally political, religious, or ideological.²⁶

FM 100 –19, Domestic Support Operations: The calculated use of violence or the threat of violence to attain goals that are political, religious. or ideological in nature. This can be done through intimidation, coercion, or instilling fear. Terrorism includes a criminal act against persons or property that is intended to influence an audience beyond the immediate victims.²⁷

There remain disparities in the definitions addressed above as to the intent and motivation of the terrorist. The Department of State seems to focus exclusively on political motivation, while the FBI and DOD include social, religious, and ideological motivations. The latter agencies, I think more closely reflect the nature of the current threat. A clear distinction made in recent definitions is the calculated use or threat of use of "unlawful" violence. Certainly we would and should continue to consider these terrorist acts unlawful. Although these definitions reflect a strong tendency to consider all acts of terror as criminal acts, this does not rule out the possibility that a given act of terrorism in a larger sense could be determined an act of war. After all many terrorist acts committed during the course of war would be violations of the laws of war and considered war crimes.²⁸

TERRORISM DOCTRINE AND POLICY

National: The 1999 National Security Strategy strongly addresses the terrorist threat throughout the document. President Clinton mentions it in the preface and the conclusion and the strategy clearly identifies terrorism as a threat to the nation's vital interest. In addition it labels it among our most serious threats deserving the highest priority. While it is categorized

as a crime, countered whenever possible using law enforcement and diplomatic resources, it does recognize the need to deal with threats using military options and exercising the right to act in self-defense.²⁹ Below is the U.S. Counter terrorism Policy:³⁰

- □ First, make no concessions to terrorists and strike no deals.
- □ **Second**, bring terrorists to justice for their crimes.
- □ **Third**, isolate and apply pressure on states that sponsor terrorism to force them to change their behavior.
- Fourth, bolster the counterterrorism capabilities of those countries that work with the
 U.S. and require assistance.

Three Presidential Decision Directives drive our national counterterrorism policy: PDD-39, U.S. Policy on Counterterrorism; PDD-62, Combating Terrorism; and PDD-63, Critical Infrastructure Protection. PDD-39, a largely classified document, lays out US policy on counter terrorism. Issued in 1995, it emphasizes the threat to national security particularly from weapons of mass destruction (WMD) and the imperative to deter and defeat the threat anywhere it appears. It does, however, state that terrorism, while a potential national security threat, is a criminal act and stresses response efforts in the area of apprehension and prosecution of terrorists. In the paragraph addressing responding to terrorism the directive seems to leave open a military response within the law by the wording "arrest or <u>defeat</u> perpetrators, respond with <u>all appropriate instruments</u> against the sponsoring organizations and governments and provide recovery relief to victims, as permitted by law". PDD-62 and 63 simply support PDD-39. PDD-62 appointed a national coordinator to the National Security Council. PDD-63 pays particular attention to security of our critical infrastructure using antiterrorism efforts and developing proactive and reactive consequence management capabilities. S2

Department of Defense. The National Military Strategy does not address the threat of terrorism in as strong of terms as the 1999 National Security Strategy probably because the military strategy was written in 1997. It does clearly state that terrorism is a threat to our national interest, but not considered an act of war in the "classical sense". It recognizes however that a military response may be required if the threat exceeds the ability of other agencies and only in accordance with applicable laws. It further recognizes the threat as one of three special concerns (terrorism, WMD, and info war) and that all three may be used

asymmetrically in support of a conventional attack on the United States.³³ Secretary Cohen's 2000 Annual Report to the President and Congress does reflect a more vigorous treatment of the terrorist threat with an entire chapter devoted to the threat of WMD. The report however focuses almost exclusively on military support to consequence management and does not discuss terrorism as either a criminal act or an act of war.³⁴ Other key DOD publications also address the threat in much the same terms. The publication called Joint Tactics, Techniques, and Procedures for Antiterrorism clearly states that terrorist acts are criminal acts. Terrorists do not meet the four requirements necessary for combatant status (wearing uniforms/distinctive insignia, carrying arms openly, under responsible command, and conducting operations in accordance with the laws of war) and therefore captured terrorists are not afforded the protection from criminal prosecution attendant to prisoner of war status.³⁵

Futures: JV 2010 recognizes terrorism as both an external and a domestic threat. It addresses future concerns over terrorist biochemical and cyber attack and the blurring distinction between terrorist groups, warring factions, insurgents, and international criminal organizations.³⁶

Our policy and supporting doctrine addresses terrorism as a growing threat to national security. This threat requires our highest attention. The message in our policy and doctrine is that terrorism is a crime, yet we recognize the magnitude of the threat and the potential need to respond with all appropriate instruments of power. While terrorism is a crime, our position leaves open the possibility that a given act of terrorism is also an act of war all be it in an unclassical sense.

DOMESTIC LAW

Changing environments and threats have always resulted in evolving domestic law to deal with changes. This is certainly true in combating terrorism and has been particularly true in combating the threat of a catastrophic incident. The Constitution and subsequent U.S. law, while limiting military involvement in domestic law enforcement, allows for military action when compelling reasons exist and when action is deemed needed and directed by the National Command Authority, or in the case of State use of the National Guard, by the respective State

Governor. The Posse Comitatus Act (PCA) is the primary document that guards against excessive military involvement in law enforcement matters. There is however a number of exceptions to the act, both addressed in the Constitution and in more recent legislation.

The Constitution allows Congress and the President to use the military to ensure laws are executed. Article 1, Section 8 allows the Congress to call out the militia to execute the law, suppress insurrection, and repel invasions. The last two points are key in the case of acts of terrorism deemed to support insurrection or invasion. Article 2, Section 3 gives the President great latitude in the responsibility to ensure laws are faithfully executed.³⁷

The Posse Comitatus Act (PCA), 1878, (US Code, Title 18, Section 1385) prohibits the use of US Armed Forces to execute the laws of the United States unless expressly authorized by the Constitution or by Act of Congress. As stated above, the President may direct by executive order the military to act under Article 2 Section 3 of the Constitution. The Army may also be used when the President invokes the Insurrection Statutes under Title 10 of the US Code. Support during nuclear incidents, chemical – biological terrorism, and to the Secret Service are also exceptions under the US Code. These exceptions allow the use of the military under compelling circumstances. If an exception does not exist then our resources may only be used to provide indirect support to law enforcement authorities. The bottom line is the spirit of the PCA prohibits the use of our military to enforce the laws of the United States unless there is compelling reason for the President or Congress to authorize its use.³⁸

There are no significant restrictions on the use of the military in the area of consequence management. DODD 3025.1governs all planning and response by DOD Components for civil defense or other assistance to civil authorities with the exception of support to law enforcement operations under DODD 3025.12 and contingency war plans. It focuses on the assignment and allocation of DOD resources to support civilian authorities during civil emergencies arising during peace, war, or transition to war.³⁹ Three documents influence this support:⁴⁰

□ The Stafford Act states that it is the policy of the federal government to provide an orderly and continuing means of supplemental assistance to state and local governments in their responsibilities to alleviate the suffering and damage that result from major disasters or emergencies.

- □ Federal Civil Defense Act of 1950 states that the DOD will support civil authorities in civil defense emergencies catastrophic/attack emergencies.
- Executive Order 12656 states that it is federal government policy to have sufficient capabilities at all levels of government to meet essential defense and civilian needs during any national security emergency.

President Clinton on April 24, 1996, the first anniversary of the Oklahoma City bombing, signed the Comprehensive Terrorism Prevention Act of 1995 (Public Law 104-132) into law. The Act bolsters the United States' ability to combat terrorists regardless of where they attack. The provisions provide for clear federal jurisdiction for international terrorist attacks within the US. It also creates a new federal crime for acts of terrorism involving violations ranging from murder to destruction of property. The law would only come into play if the Attorney General certifies two key points related to the offense: 1) The offense transcended national boundaries, and 2) The offense was of a terrorist nature intended to coerce, intimidate, or retaliate against a government or civilian population. This act provides law enforcement greater latitude in pursuing this type of investigation. As an example it eases legal requirements for pretrial confinement and electronic surveillance. The Act also provides for a myriad of other authorizations that tightened the grip on anyone wishing to prosecute a terrorist agenda anywhere in the world.41 The act focuses on terrorism from a law enforcement paradigm by providing law enforcement greater latitude to fight terrorism as a crime. As such the ACLU and others have raised concerns that this act will erode the rights and protection enjoyed by Americans.42

Investigative Guidelines. Domestic terrorism investigations are conducted in accordance with the Attorney General's Guidelines on General Crimes, Racketeering Enterprise, and Domestic Security/Terrorism Investigations. The guidelines govern domestic terrorism investigations and set forth parameters for investigations of U.S. persons who reside in the United States, who are not acting on behalf of a foreign power, and who may be conducting criminal activities in support of terrorist objectives. Attorney General Guidelines for FBI Foreign Intelligence Collection and Foreign Counterintelligence Investigations govern international terrorism investigations. It sets forth guidelines for investigating U.S. persons or foreign nationals in the United States who are targeting national security interests on behalf of a foreign power.⁴³

The Foreign Intelligence and Surveillance Act (Title 50, Chapter 36) lays out policy and procedures for the legal collection of foreign intelligence without court order, but with specific certification by the Attorney General that the collection effort is within the intent of the law. This act also provides special authorizations during times of war under Sections 1811, 1829, and 1844 which allows the President, through the Attorney General, to authorize electronic surveillance, physical searches, and the use of a pen register or trap and trace device respectively without a court order to acquire foreign intelligence information for a period not to exceed fifteen calendar days following a declaration of war by the Congress.⁴⁴

Our domestic law certainly reflects our deep-seated desire to limit the involvement of the military in civil affairs, especially in the area of enforcing our laws. On the other hand our laws do allow the latitude for using the military when compelling reasons exist. Our Constitution and subsequent laws also guarantee certain strong protections of our civil liberties, yet there are exceptions that allow law enforcement, intelligence agencies, and the military to combat threats to the U.S.

INTERNATIONAL LAWS / LAW OF WAR

Throughout history the United States has preferred to fight threats to national security, as far from our homeland as possible and in our recent history we have been effective in doing that. To counter the terrorist threat far from our homeland through viable deterrence and preemption it is important to understand international laws that govern the nature and intensity of our response. The United Nations' Charter, the Geneva/Hague Conventions, as well as numerous other international treaties and agreements provide guidelines for nations to defend themselves against acts of aggression. Whether an act is viewed within the rule of law as a criminal act or an act of war influences the measures that can be taken.

The UN Charter addresses the inherent right of a state to defend itself. Article 2 (4) states that all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state. Article 39 allows the Security Council to determine when a violation of the peace exists and to recommend both nonmilitary and military actions. Probably the most important article of the charter as it relates

to the thesis of this paper is Article 51 which states "Nothing in the present charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the UN, until the Security Council has taken measures necessary to maintain international peace and security". The UN Charter governs only acts of aggression by one state upon another and only two legitimate military actions are authorized: those sanctioned by the Security Council and those that are in accordance with Article 51.⁴⁵

The issue of self-defense is an issue of some controversy. Strict interpreters of the Charter suggest that Article 51 only allows a state to respond to an actual armed attack in effect taking the first blow. They also suggest that the response must end when the Security Council takes action under Article 41 (nonmilitary) or Article 42 (military). Preemptive action is not authorized within this strict interpretation. Fortunately the United States and most other states take a broader view including what is referred to as anticipatory self-defense. These states believe that the Charter did not intend to take the customary rights of self-defense away from sovereign states. The UN Charter does lay out the world's just recourse to war (jus ad bellum) with its inherent principles of necessity, such as using military force only as a last resort and only with a reasonable hope of success, and proportionality, that is limiting force to only what is needed to counter the immediacy of the threat. Three areas define a state's right to selfdefense: protection of nationals and their property abroad, protection of political independence, and protection of territorial integrity. The US has not had its territorial integrity and political independence threatened since WWII. Recent history however has seen many uses of the customary right of self-defense to protect our citizens. This justification was used in Grenada, Panama, and in our failed attempt to free the hostages in Iran. Still the most controversial aspect of the right of self-defense is the principle of "anticipatory self-defense". This is the right of a nation to strike in self-defense to thwart an imminent attack. As this concept allows a great deal of subjective latitude to the "threatened" state, its use often provokes unfavorable response from other nations. The US strikes against Libya and state sponsored terrorist in 1986 and terrorist elements in Sudan and Afghanistan in 1998 are examples. Our argument at the time was that these strikes were not retaliatory, but executed rather to prevent further imminent attacks. Despite this justification these strikes each met with condemnation from the world community.46

The Law of War as recognized by the U.S. is derived from two sources: the Geneva/Hague Conventions and customary law. These conventions and laws cover a wide

variety of subjects regarding the conduct of war. A few points as it relates to this paper are instructive. War may be defined as hostilities between two or more States. An outbreak of hostilities is often initiated by a formal declaration of war, although armed conflict can occur without a declaration if sanctioned by the United Nations or exercising the right of self-defense against an armed attack. The conventions also cover areas that restrict the legal prosecution of a war such as prohibiting the use of poisons or poisonous weapons or the protections afforded medical personnel, prisoners, and other noncombatants.⁴⁷

Much international law deals with the issue of terrorism through multinational and binational agreements that focus on the misdeed or crime without labeling the incident terrorism. These laws tend to deal with incidents that the international community can easily agree must be stopped. They include: 1970 Hague Convention on hijacking aircraft, 1971 Montreal Convention on sabotaging aircraft, 1973 New York Convention dealing with attacks on political dignitaries, 1988 Convention for the Suppression of Unlawful Acts Against Safety of Maritime Navigation, and the 1977 European Convention for Suppression of Terrorism dealing with extradition agreements. All of the agreements above, except the European Convention, target a misdeed regardless of motivation and thereby sidestep the volatile issue of terrorism.⁴⁸

DISCUSSION

This section will address legal and operational aspects of terrorism by first using the law enforcement paradigm (criminal act) and, next using the national security paradigm (act of war). The section will conclude with a comparison of the two models.

On May 22 1998, President Clinton signed Presidential Decision Directives 62 and 63 and appointed a national coordinator for security, infrastructure protection, and counter terrorism to the National Security Council. The President marked this event with the comment that the country must fight the new terrorist threats "with the same rigor and determination we applied to the toughest security challenges of this century." ⁴⁹ The very nature of this new form of terrorism is that the threat is no longer exclusively a law enforcement problem with little impact on national security. With no real peer competitor to present a symmetrical threat on the horizon, the new terror threat is now or will certainly grow to be, the most likely and significant

threat to our national security for the foreseeable future.⁵⁰ How we prepare to respond to the threat depends on understanding the two response paradigms we currently use to counter the threat and then deal with the question: Do we treat these attacks as acts of war or criminal acts?⁵¹

TERRORISM AS A CRIMINAL ACT - THE LAW ENFORCEMENT PARADIGM

Determining an act of terror strictly as a criminal act embraces the law enforcement paradigm for forming a response. This paradigm is marked by an investigation process, rules of evidence, constitutional protection, a presumption of innocence, and post facto arrest and punishment.⁵²

Use of the law enforcement paradigm in responding to terrorism as a criminal act is largely the status quo. This is not surprising as US, and for that matter international, law and doctrine consider terrorism a crime. With few exceptions, our response to acts of terror strictly follows a typical law enforcement process: an incident occurs, an investigation ensues, suspects are identified, pursued, brought to trial, prosecuted, and if convicted, imprisoned. Certainly there have been many success stories by law enforcement standards, such as the Unabomber, Oklahoma City bombing, the World Trade Center bombing, and more recently the successful prosecution of a suspect in the Lockerbie case. Under Constitutional and other current law enforcement and judicial constraint the US continues to find and successfully prosecute terrorist. While one could argue that the standard for success in this paradigm is to prevent crime, often the more immediate measure is the number of cases solved and successfully prosecuted. In 1997 FBI Director Louis Freeh told the Senate Judiciary Committee that given sufficient resources the bureau could solve terrorist crimes. S4

To flesh out the pros and cons of the law enforcement paradigm, one must understand the process. The probability of a successful end state – identification and conviction of all responsible, is based on a number of factors. Success depends on viable witnesses, finding trace evidence, a cooperative environment, investigative latitude and skill, and productive use of sufficient resources. Trace evidence is often the most conclusive evidence in a trial as it is based on scientific analysis. Ballistics, trace chemicals in explosives, incident reconstruction, document analysis, fingerprints, DNA, and other forensic evidence can provide definitive

information to focus an investigation or successfully conclude it outright. Despite the value of forensic evidence, witnesses remain the most important aid in a successful investigation and prosecution. Witnesses assist in identifying evidence, suspects, and other sources of information. Without this cooperation an investigation and prosecution is at best difficult and at worst impossible. The overall environment that investigators work in is also important. Cooperation among police and judicial agencies and local government offices impacts the progress of any case. Obviously the skill of the forensic scientists, investigators, and prosecutors can have either a negative or positive effect that is difficult to measure, but perhaps more important is the latitude within the law (search and seizure, rules of evidence, burden of proof) that this team has to work with. Finally the more time, money, personnel, and equipment are brought into play the greater the chance of eventually solving the crime and building a successful prosecution. 55

The benefits of the law enforcement paradigm rest in its foundation in the rule of law. The paradigm provides a measured approach to the problem that follows well-known and commonly accepted police and judicial practices. The separation of the police aspects of the process with the judicial aspect also provides a system of checks and balances largely designed to keep the police in check. A fully successful investigation provides the proof needed to convict all guilty parties. Such successes ensure the continued credibility of the system. More important a successful prosecution inspires confidence in the system, confidence that terrorist will be brought to justice and confidence that our civil liberties will not be eroded in the process. If we wish not to be seen as capricious or flaunting our power then a fully successful criminal investigation and prosecution as described above is certainly the best solution. A properly executed case provides us the moral high ground. In the eyes of our citizens and the world we are rightly seen as responding to this criminal act in a prudent and civilized manner in keeping with our position as a superpower. The terrorists are brought to justice legitimately and through due process found guilty and punished. The crime is solved and deterrence is served

Of course all investigations are not fully successful and even among those that are they do not always produce the desired impact. A number of factors are particularly problematic in strictly pursuing the law enforcement paradigm in terrorist cases. First, while there is certainly a goal to prevent crime in the first place, and in some cases the circumstances to preempt a crime prior to its commission, the law enforcement paradigm is largely reactive. In domestic law enforcement, issues of rights of privacy and other civil liberties limit law enforcement's ability to

look for criminals prior to a criminal act.⁵⁶ Once the act occurs it presents particular challenges for the investigation. The catastrophic nature of the attack makes finding trace evidence difficult as much of it is destroyed or made inaccessible by the event itself. If evidence is available, the incident site often requires teams of highly qualified technicians to work for long periods before useful evidence is produced. Witnesses can also be problematic. While a positive investigative aspect of a terrorist act is outrage on the part of citizens enhancing their motivation to cooperate, the impact of an event that causes mass destruction kills those who were in the best position to see what happened. The flip side of outrage is fear. Fear of terrorist reprisal hampers cooperation. In the case of a crime scene outside the US the potential problem of an unfriendly population is also a factor.⁵⁷ Given the current frequency of attack, the US has no shortage of investigative skill. However investigative latitude is not always conducive to finding the criminal. The threat an act of terror produces and the outrage generated energizes authorities to get answers and to bring the guilty to justice. As a result the US expends a great deal of resources to conduct a successful investigation. The manpower alone on some of these cases is staggering. At one point in the embassy bombings in Africa up to 200 FBI agents alone were working the crime scenes.⁵⁸

Not only is this approach reactive and resource intensive, but also it is inherently slow particularly in the case of terrorist attacks. Due to the very nature of terrorism and particularly catastrophic terrorism the process as described above with all the drawbacks takes a great deal of time. Often by the time the investigation is completed and due process adhered to, conviction of the guilty can take up to 10 years and more such as in the recent culmination of the Lockerbie case.

Arguably one of the biggest drawbacks of the paradigm is often the convicted do not represent all those responsible and certainly do not include higher authorities such as Muammar Qaddafi or Osama bin Laden. Paul Bremer, former US Ambassador at Large for Counter Terrorism stated recently during a TV news show that hundreds of Americans have died in the last 12 years and no senior official has been brought to justice showing the limitation of the law enforcement approach. As Bremer stated in the case of Islamic terrorism – martyrdom is a goal so criminal prosecution and the possible death penalty do not provide a deterrence. So perhaps a law enforcement approach is not effective in dealing with the threat, maybe a national security response would prove more effective.

TERRORISM AS AN ACT OF WAR - THE NATIONAL SECURITY PARADIGM

Determining an act of terror strictly as an act of war embraces the national security paradigm for forming a response. This paradigm is marked by an aggressive effort to gather information to ensure early identification of a threat, action to deter or decisively preempt the threat, and failing that retaliatory action to prevent or deter further threat action.⁶¹

The very term war invokes an emotional and even visceral response. Yet, since the end of the World War II, the war label is perhaps a dichotomy. After all we have not officially made a declaration of war since. We have conducted police actions, coalition operations under UN mandate, peace operations, and operations other than war. We even have responded to acts of aggression in response to Libya after the Berlin Disco bombing and to the attacks on our embassies in Africa, invoking our right of self defense under Article 51 of the UN Charter. On the other hand, we loosely apply the term war and attribute it to any number of endeavors – the Cold War, the War on Drugs, the War on Poverty, and the War on Organized Crime.

So what does the label do for us? In one vain calling a terrorist attack an act of war seems to simplify the matter seemingly allowing us to destroy the attacker with whatever force can be brought to bear. At the same time the label complicates matters as the term lends credibility to the opponent or at least affords the individual combatants soldier status and protection in accordance with The Hague and Geneva Conventions. A declaration of war is an extreme measure not particularly conducive to good relations in this 21st century world order. And in the case of the terrorist threat it is not always clear as to whom we will declare war on.

Senator Tim Hutchinson, referring to the USS Cole during Congressional hearings on the matter, asked if the attack legally should be considered an act of war and hence provides greater latitude in our response. The senator went on to emphasize the need to have a swift and severe response to these acts - enough so as to deter. Certainly deterrence and the option to preempt is one of the strongest aspects of the national security paradigm. The process provides for diplomatic efforts to reduce the likelihood of attack and garner cooperation from other countries in our effort to combat the threat. Our intelligence community maintains a continuous effort to track all threats to the US ideally identifying them in enough time for us to

act to deter or preempt. While one can argue whether we are doing enough we are still exercising these response options. The real difficulty arises when some form of military response is required.

In the past our responses have been reactive. As explained in the previous section our overt response typically follows the law enforcement paradigm. The terrorist threat is rarely clear and since a state of war does not exist when these attacks occur the question of whom we are going to defend ourselves against becomes problematic. Hence it is difficult to get away from the law enforcement paradigm. Short of an overt and plausible claim of responsibility or immediate knowledge of the identity of the attacker, whether a state or transnational, we still need at least some evidence to properly direct our response. In referring to the attack on the USS Cole, Michael Glennon, a law professor from the University of California at Davis, states that evidence needed to warrant a military response is unclear. While Article 51 of the UN Charter allows for use of military force in self-defense it does not provide any international law that answers the question of how much evidence is enough. In the case of the Cole, Glennon's recommendation for President Clinton was to "insist upon evidence that is highly probative, but not necessarily beyond a reasonable doubt. 63 In Ronald Reagan's attack on Libya in 1986 reference is made to incontrovertible evidence of Libya's complicity and in a 1993 Iraqi plot to assassinate former President Bush, President Clinton sited compelling evidence from intelligence officials to justify cruise missile strikes on the headquarters of Iraqi Intelligence.⁶⁴ So it appears that we cannot escape the law enforcement paradigm in most cases as determining responsibility is critical to the success of any response. The issue of how much evidence is needed remains and the difficulty in getting that evidence was discussed in the previous section.

The response picture gets cloudier when we consider preemptive action based on anticipatory self-defense addressed in customary international law. Preempting an attack is obviously preferred, but what constitutes justification for preemptive strikes if a state of war does not already exist. The evidence for such a response now is likely to come not from any investigative process under the law enforcement paradigm, but from intelligence sources directly part of the national security paradigm. Certainly we can justify a preemptory response if the attack is imminent, but we still lack measures of evidence to allow us to say we have enough. Must we have evidence of intent to attack coupled with evidence of a capability to attack? Do we need evidence that an attack is imminent and what constitutes imminent? Of

course, if an actual state of war exists, hostilities continue until one side is completely destroyed or surrenders. Forceful response using lesser measures of evidence is fraught with disaster. Poor or incomplete evidence could lead to striking targets that have no relation to the threat. We must also consider the danger of being used by our enemies to strike at others falsely.

Using the legal conventions in the law of war complicates the war determination. War by definition is a matter between two or more states or "contracting powers". So a proven attack by a transnational organization, such as al Qaeda, is not by international standards an act of war. Of course all transnational groups operate from one or more states, but the degree of influence and responsibility the state has is difficult to determine.

The discussion above highlights the utter complexity of the problem of combating terrorism. The complexity of the problem does not allow for us to simply label an act of terrorism as an act of war or a criminal act. Our responses to recent acts of terror do not neatly fall into one paradigm either law enforcement or national security. The discussion has laid the groundwork to analyze the problem in light of the threat of catastrophic attack.

COMPARING THE PARADIGMS

Expert review of the effectiveness of the law enforcement paradigm are mixed. Rand terrorism expert Bruce Hoffman put it this way "The verdict on the law and order approach may depend on whether the issue is viewed as a glass half full or half empty". Some officials and experts point to the success of many investigations and ensuing prosecutions stating that these efforts while having their shortcomings still take terrorist off the streets and put diplomatic pressure on States. Tied with economic sanctions, such as the case of Libya, there has been a positive effect. Many experts feel however that the law enforcement approach falls woefully short. Vincent Cannistraro, a former CIA specialist on terrorism states, "the use of criminal prosecution is a half-measure. It doesn't do anything to attack the sources of terrorismIt's like taking away some of the bullets, but keeping the gun in use. You can always find more bullets." Bruce Hoffman of the Rand Corp put it this way: "And just throwing people in jail is like swatting at mosquitoes". Noted author and strategic studies expert Edward Luttwak complains of the vast resources expended with little return on investment. Referring to the

recent verdicts in the Lockerbie case, Luttwak points out the Qaddafi was never questioned let alone arrested or convicted and the vast intelligence effort that went into producing evidence for the trial probably would have been better spent focusing on future threats.⁶⁹

Despite the disagreement over the value of the paradigm we have done relatively well. The frequency and lethality of attacks in the past have been tolerable. Overall casualties in the 90s were less then in the 80s. We have not suffered great economic damage, the threat of terrorism is not a significant issue in the minds of the American public and confidence in all our institutions remains high and our standing as a world superpower is unchanged. We have maintained this status during our continuing efforts to combat terrorism without significantly eroding our civil liberties although admittedly there would be some argument over the significance of the changes made to date to thwart terrorism. All the response objectives introduced earlier have largely been met. The incontrovertible fact about the law enforcement paradigm is that while the degree of its success remains arguable, no expert has ruled out the need to be able to establish responsibility with evidence, all be it an undefined amount, to target preemptive or retaliatory military action.

So what is the real issue regarding this question – act of war or criminal act? We have and will continue to use all elements of national power to counter the threat of terrorism. The debate can rage over the degree in which we pursue this effort, but we do do it. We have and will continue to respond to acts of terror forcefully when the situation allows by invoking Article 51 and using the evidence we have to justify the action (e.g. air strikes on Libya and cruise missile strikes on Osama bin laden and Iraq). We will certainly do the same if we have "compelling evidence" of an imminent attack. We will continue to do all of this within both the paradigms in a manner that meets our national security interests. Terrorism is a crime and whether we also call a certain terrorist attack an act of war without declaring war realistically has little affect on our response. We will execute whatever response is justified by the evidence and practical by the diplomatic and political situation. Simply we haven't formally declared these past acts as acts of war so why would we do it in the future?

The great dilemma we face is that it is one thing to respond with force to an attack, and yet another to parry or preempt an imminent attack. However, as the potential for catastrophic loss rises how long can we wait to preempt an attack, particularly if we are presented with an

enemy who has displayed the intent and the capability to conduct such an attack? Retired General Zinni tied the determination of an act of war to state sponsorship:

"I think Senator, we ought to begin with, in my view, with who we determine is responsible. If this is a case of state sponsorship, if we find one of the state sponsors of terrorism is behind this, and its roots go to the senior levels that made this decision, then I think it is an act of war by a state, and I think appropriate action should be taken."

The greatest deterrence to an act of war by another state against the U.S. has been and remains the fact that to do so would assure their own destruction. A now one sided Cold War concept, simply put - any state who chooses to attack us whether symmetrically or asymmetrically risks their own destruction. Certainly any catastrophic act committed against the U.S. would yield an attack in kind. So while an attack is possible its more likely that a future catastrophic attack against the U.S. will be committed in a manner where state responsibility will be extremely difficult to determine and consequently more difficult to identify the appropriate target for our response.

The situation with the Osama bin Laden's organization is instructive. Al Qaeda is a transnational terror organization that has openly declared war, a jihad against the U.S. through the issuance of a fatwah or decree. ⁷² Bin Laden has consummated this with several attacks such as the embassy bombings in Africa and his strongly suspected involvement in the attack on the Cole. He has operatives and cells working within the US and throughout the world that we are aware of. While this highly networked group operates in many different countries, the Islamic fundamentalist Taliban which controls approximately 90% of Afghanistan openly provides sanctuary for Osama bin Laden himself.⁷³ At what point do we treat him seriously enough where we can no longer wait for evidence of an imminent attack to preempt one of his moves? Does not al Qaeda very existence present a threat serious enough to warrant a continuous application of force until the threat has been nullified? Of course neither the al Qaeda nor the Taliban are states and therefore we cannot declare war, but we may have to act unilaterally or garner support in the UN for sustained operations against them. Covert action may be effective, but it doesn't send a signal to other potential adversaries and limits response options significantly. Perhaps a request for a UN arms embargo and other sanctions against Taliban would help, but it also is a limited option in light of the potential threat of catastrophic terror.74

CONCLUSION

Although not in a legal sense we are already at war - A war on terrorism. In addition to being the sole super power, we are unfortunately also the sole super target for asymmetric attack. Like it or not some transnational and state surrogate terror organizations have declared war on us and that fact makes the threat of catastrophic attack even more sobering. This threat, while not really new, is becoming increasingly more likely as time goes by. This fact dictates that we take a new look at how we view these acts of terror (war or crime) and the paradigms we use to respond.

A declaration of war may well have passed its practical use. The political inflexibility and emotional baggage that comes with a declaration of war in an environment of globalization and the New World Order renders it largely impractical. In a strategic environment of engagement to promote stability, democracy, and economic prosperity the very term war is counterproductive. We have not used a declaration of war since World War II and I do not see a set of likely circumstances in the foreseeable future where we would declare war. Certainly the wisdom of the United States declaring war against a transnational is questionable. Such an act would lend credibility to a terrorist or criminal organization far in excess of its proper standing in the world. We have already exercised our right of self-defense under Article 51 of the UN Charter without formally declaring war. We will certainly continue to exercise this option. While the decision to use armed force should remain a last resort, in the example above we are presented with a "state of war" that exist between Al Qaeda and us. Combining this state of war with al Qaeda's wherewithal to commit acts of terror, and certainly the future capability to commit acts of catastrophic terror, the risk of loss grows exponentially.

Nonetheless, there is no inclusive determination to classify all acts of terror as either solely acts of war or a criminal acts. Both the law enforcement and national security paradigms are needed to offer a full spectrum response to all acts of terror. Whether we are protecting against a car bomb in Saudi Arabia causing hundreds of deaths or an anthrax attack on New York causing millions, our need to gather intelligence before the fact or to investigate an incident after the fact is an absolute necessity. Regardless what evidence we deem, what the international community deems, sufficient to exercise our right of self-defense, we still must have evidence that triggers the enforcement end of the national security paradigm. While military force may be warranted against a terrorist group, we would not want to rule out

response options allowing us to bring any of the guilty parties to justice or to seek redress in civil trials to recoup monetary losses.

Terrorism is and should remain a crime, but this fact does not rule out a response paradigm that also considers a given threat an act of war. We must recognize that the stakes have risen and that waiting to respond to an imminent attack may expose the country in a way that threatens our very existence. Our ability to exercise our right of self-defense within the rule of law remains paramount. When faced with a transnational terror organization or a state supported group that has openly declared war on us and our allies, consummated that threat with a series of attacks, and has the ability to at least acquire weapons of mass destruction, then we must consider that a state of war in fact exists all be it in an unclassical sense. That state of war while not declared should trigger both covert and overt actions across the full spectrum of response options to eliminate the threat. The unorthodox nature of the threat requires further changes in the rule of law both domestically, and if possible internationally, to allow our law enforcement and national security assets the latitude to meet the threat on the most favorable ground possible.⁷⁷

RECOMMENDATION

There have been scores of books, articles, studies, and commissions recommending what we should do to respond the national security challenges of the 21st century. I will try to limit my recommendations to those that more closely relate to the focus of the paper. The paper has shown that our priority of effort against catastrophic terror should be in the proactive spectrum to deter, detect, and preempt attack.

A new paradigm is needed, one that incorporates both the law enforcement and national security paradigms. A declaration of war provides a great deal of latitude to law enforcement and national security forces both domestically and internationally as they are responding within the rule of law to a national emergency. However, as stated there is little practicality in declaring war in the strategic environment of the 21st century. As we are not likely to declare war we must develop new domestic and international laws now to allow for the effective use of a full range of assets both at home and abroad to counter the threat of catastrophic attack before it happens.

I see these efforts in four areas. The first is the need for additional laws that criminalize acts of terror and prohibited weapons development by building on already existing laws against piracy, airplane hijacking, proliferation of WMD – to make many terrorist acts universal individual crimes. The second area would allow victims of terror to be compensated by states that sponsor terrorism or by the transnational organization through civil legal action. Third is the development of emergency measures that could take effect when ordered by the president. Such an order would essentially declare a national emergency and allow for previously determined increased latitude for law enforcement and military response such as the war exception in the Foreign Intelligence Surveillance Act. As an example such a measure would provide law enforcement with greater latitude in acquiring legal authorization for physical and electronic monitoring. The fourth and perhaps most controversial would be an executive or congressional declaration of a state of national emergency that would allow still greater law enforcement latitude over a greater period of time and approve use of force options by the military. If these contingency laws are worked now we can obtain wider acceptance and provide for checks and balances that uphold our liberties while still protecting us.

Then we must be prepared to initiate these measures sooner perhaps then we have in the past not only to assist in identifying our attacker after the fact or shortly before the attack, but instead to respond to a viable, standing threat continuously until the threat is destroyed. Initiating a de facto state of war without declaring war. DOD's role would be unchanged other then maintaining the proper mix of special and conventional forces to assist when called. DOD should not claim the lead role in this fight. The U.S. has a robust law enforcement structure that may warrant reorganization, but has the resources to do the job.⁸¹

Much of what I recommend will not be swallowed easily. Holistically we must consider every response, every action for the negative and positive aspects it has. These are hard decisions. Whether we can prevent a catastrophic attack remains to be seen, after all according to the experts it is only a matter of time before it happens, but to take no action invites catastrophe and risks our national survival.

"The Romans so cherished their civilized image of themselves that it blinded them to the strengths of the barbarians, and Rome's greatest failure was its inability to understand the changing world". 82

Our greatest strength – openness, civil liberties, and democratic ideals - is also the source of our greatest weakness. We must take caution that our civilized image of ourselves does not blind us. Therefore we must recognize the changing nature of what threatens us and work now to strike the proper balance that will allow us to maintain our national security and at the same time retain our national identity as a free and open society else we risk the faith of Rome.

Word Count = 10,301

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